IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-569

NEW YORK SHIPPING ASSOCIATION, INC., *Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

No. 76-570

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

BRIEF OF INTERVENOR-RESPONDENT CONSOLIDATED EXPRESS, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN D. SCHNEIDERMAN
JAMES D. HUTCHINSON
SAMUEL T. PERKINS
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Intervenor-Respondent Consolidated Express, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CASES

A. SUPREME COURT

B. COURTS OF APPEALS

C. District Courts

D. Agency Decisions

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-569

NEW YORK SHIPPING ASSOCIATION, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

No. 76-570

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

BRIEF OF INTERVENOR-RESPONDENT CONSOLIDATED EXPRESS, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether the court of appeals erred in holding that there was substantial evidence to support the NLRB's decision that agreements between petitioners violated Sections 8(b)(4) and (e) of the National Labor Relations Act in that they had an unlawful secondary objective—namely, the acquisition for members of the Internatonal Longshoremen's Association of container packing work which had traditionally been performed off the pier by non-ILA employees of intervenor and other freight consolidators.

COUNTERSTATEMENT OF THE CASE

I. Parties and Proceedings Below

On June 1, 1973, Consolidated Express, Inc. ("CEI"), an intervenor-respondent herein, filed unfair labor charges with the National Labor Relations Board ("NLRB") against the International Longshoremen's Association ("ILA") and the New York Shipping Association ("NYSA"), petitioners herein, alleging that ILA had engaged in a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the "Act") and that petitioners together had maintained and given effect to "hot cargo" agreements in violation of Section 8(e) of the Act. The charges arose out of the enforcement of the Rules on Containers negotiated between petitioners. Pursuant to those Rules, NYSA agreed that its members would be precluded from supplying containers to CEI or other similarly situated freight consolidators who had traditionally packed ("stuffed") LCL or LTL containers[1] at their own off pier facilities. The

[1] Containers with consolidated loads are frequently described as "LTL" (less than trailer load) or "LCL" (less than container load). The two terms merely indicate a quantity of freight less than that which a container can hold.

Rules also required that ILA members on the pier unpack ("strip") and restuff all containers shipped by such consolidators.

Having concluded that ILA and NYSA had violated the Act by adopting, maintaining and enforcing the Rules on Containers, the Regional Director of the NLRB petitioned the United States District Court for the District of New Jersey for a preliminary injunction pursuant to Section 10(1) of the Act. Following extensive evidentiary hearings, District Judge Lacey granted the requested injunction, a decision affirmed by the Third Circuit.[2]

The record established in the injunction proceedings, supplemented by affidavits, was agreed by all parties to constitute the record for the unfair labor practice charges before the NLRB. On review, the full NLRB reversed an initial decision rendered by Administrative Law Judge Ordman. The Board found that CEI as well as other consolidators had traditionally stuffed and stripped LCL or LTL containers at off pier facilities using teamster employees and that alleged ILA stripping and restuffing of CEI's containers had not occurred. The court noted that the non-ILA work tradition with respect to container consoli-

[2] Balicer v. International Longshoremen's Ass'n, AFL-CIO, 364 F.Supp. 205 (D.N.J.), *aff'd*, 491 F.2d 748 (3d Cir. 1973). Twin Express, Inc. ("Twin"), also an intervenor-respondent herein, filed parallel charges against ILA and NYSA on November 2, 1973. Following issuance of a consolidated complaint by the General Counsel of the NLRB, Judge Lacey issued a similar injunction in the Twin case, Balicer v. International Longshoremen's Ass'n, AFL-CIO, 86 LRRM 2559 (D.N.J. 1974).

dation predated or at least paralleled any arguable related ILA work history. In these circumstances, the Board held that, by maintaining and enforcing the Rules on Containers, petitioners unlawfully sought to obtain for ILA labor the traditional off dock work of stuffing and stripping CEI's containers and thus violated Sections 8(b)(4) and (e) of the Act.[3]

Petitioners then appealed to the United States Court of Appeals for the Second Circuit. Finding the Board's decision "supported by substantial evidence and by sound analysis," the court of appeals upheld the Board and granted the NLRB's cross-motion to enforce its order.[4] Petitioners' motion for a rehearing with a suggestion for rehearing en banc was denied on August 6, 1976.[5]

II. Factual Background

The labor jurisdiction of longshoremen has historically been defined in terms of location—namely, the docks. Longshoremen's work involves principally the loading and unloading of ships and other incidental functions performed *at the docks*. By contrast, the history of consolidation and containerization of freight has, from the beginning, involved a significant *off dock* work tradition by teamsters and other non-ILA per-

[3] Decision and order of the NLRB are reprinted in the Joint Appendix to the Petition at A58-A78. Subsequent references to this decision will be to Joint Appendix pages.

[4] The decision of the Second Circuit is reprinted in the Joint Appendix to the Petition at A79-A96. Subsequent references to the decision will be to Joint Appendix pages.

[5] The orders denying rehearing and rehearing en banc are reprinted at A97-A93 of the Joint Appendix to the Petition.

sonnel. Despite this tradition, ILA sought through the Rules on Containers to acquire the off dock work of stuffing and stripping LTL and LCL containers—work which clearly had never been done by ILA members. A brief review of the history of CEI, the freight consolidation business, and the role of teamsters with respect to cargo and container handling places the non-longshoremen work tradition in clear perspective.

The History of CEI. CEI and its predecessor, Valencia-Baxt Express, Inc. ("Val-Baxt"), have for many years performed specialized common carrier services including freight consolidation and container stuffing and stripping at their own off dock facilities. As non-vessel-operating common carriers ("NVOCCs"), they have acted on behalf of shippers to stuff freight shipments into containers, ship the containers between New York and San Juan via maritime common carriers on a single bill of lading, strip the containers at their warehouse facilities, and distribute the freight shipments to their ultimate consignees.[6]

In the earlier days of containerization, Val-Baxt used 7 or 8 foot so-called "Dravo" boxes. Somewhat larger containers were introduced by the early 1950's. (72a-73a, 794a-795a.) From the beginning of this service, the maritime carriers had hoist equipment with which fully loaded containers were placed directly from the pier abroad the consolidator's truck or were unloaded from the truck upon arrival at the pier for

[6] 72a-75a, 724a-725a, 794a. References in this format are to the Appendix filed in the court of appeals. *See* Hasman & Baxt, Inc., Valencia Baxt Express, Inc., 8 FMC 453, 454 (1965).

shipment to San Juan. The work of stuffing and stripping such containers was done by Val-Baxt with teamsters and without ILA interference. With the formation of CEI as a successor to Val-Baxt, these operations continued unchanged and unchallenged by ILA.

CEI's experience is typical of that of other freight forwarders. From the earliest years of consolidation, the truckmen rather than the longshoremen were primarily responsible for sorting and consolidating maritime cargo. For example, truckmen would collect shipments for particular ports and deliver them to the appropriate pier. (63a-65a, 71a-72a.) Systematic consolidation of individual shipments took place in a variety of ways, but almost always at the direction of the truckmen.[7]

In the mid-1950's, new types of vessels, specifically designed to carry large containers, were introduced by maritime common carriers. As much as 20 to 40 feet long, these containers were, in effect, over-the-road truck trailers. They could be placed directly on tractor and chassis rigs as an actual part of the truck, driven on and off the docks, and delivered to inland consignees with no further handling. Thus, the cargo which the new container vessels carried, the entity upon which the carrier's cargo rates were based, was the container itself.[8]

In the earliest stages of containerization, petitioners recognized the tradition of consolidating containers off the docks. Indeed, tariffs filed with the Federal

[7] *See* Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders, 6 FMC 327, 334-35 (1961).

[8] 846a-850a. *See also* Addendum A to CEI's Brief in the court of appeals.

Maritime Commission by NYSA members show that consolidation off pier was mandatory in order to qualify for the tariff rate under which consolidated containers have been and are shipped—namely, Freight-All-Kinds.[9] No meaningful change in the tariff was filed until 1973, when the events leading to this case began.[10]

By 1959, it was clear that non-ILA workers already had a tradition of stuffing and stripping all types of containers off the pier. In the 1959 ILA-NYSA collective bargaining agreement, ILA recognized the practice of off pier container stuffing and stripping by non-ILA employees and secured various monetary concessions to meet the problem of advancing technologies, including containerization. Section 8(a) of the contract stated that there was to be no ILA stripping and restuffing or any other restriction on the handling of containers, except that a royalty was to be paid on containers not originally stuffed or stripped by ILA members.[11] Petitioners construct an argument, rejected

[9] *See* Addendum A to CEI's Brief in the court of appeals, especially Pan-Atlantic's July 16, 1958 tariff, Notes 1, 5, 9. The limitation on liability established under Note 9 was acceptable to the shipper-consolidator because the containers were sealed and not subject to rehandling, loss, or pilferage. *See also* 1107a-1108a.

[10] *See* Puerto Rico Maritime Shipping Ass'n, Nos. 73-17, 74-40 (FMC, October 9, 1975) (Morgan, ALJ), finding the 1973 changes unlawful. Those changes had been designed to force the consolidators to bear the $1000 fine levied under the Rules on Containers for each consolidated container not stripped and restuffed on the pier.

[11] Section 8 of the 1959 collective bargaining agreement states:
Containers:—Dravo Size or Larger
a. *Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.*
b. The parties shall negotiate . . . the question of what should

below, that this provision recognizing off pier stuffing and stripping without ILA interference applied only to so-called shippers' loads, not to consolidated LTL or LCL containers.[12] However, the text of the contract and petitioners' own actions belie this contention. As the NLRB and the court of appeals found, the containers of Val-Baxt, CEI, and other consolidators were not stripped, restuffed, or otherwise interfered with by ILA during the entire term of the 1958 collective bargaining agreement and continuously thereafter until the events giving rise to this case.

ILA's Efforts to Acquire Off Pier Container Work. Prior to 1968, perhaps because of the continued growth of containers, the ILA did initiate some unsuccessful steps to acquire the work of off pier consolidators.[13] In 1968, ILA and NYSA agreed to the so-called Rules on Containers which required, in effect, that all consolidation of LTL cargo be performed at ILA-manned waterfront facilities.[14] These Rules, manifestly intended to acquire the work of consolidators, were inconsistent with the Freight-All-Kinds tariff provisions that require stuffing and stripping outside the pier. Moreover, the agreement provided for pay-

be paid on containers which are loaded or unloaded away from the pier by non-ILA labor . . . . 208a-209a (emphasis added).

[12] Petition of ILA at 5; Petition of NYSA at 7-8.

[13] *See* 67a-70a, 103a, 107a-110a, 113a, 120a.

[14] The Rules required that containers holding LTL shipments, originating or destined within a 50-mile radius of the port in which the container was either loaded aboard or discharged from a vessel and whose contents were not beneficially owned by a single person, would be stripped and stuffed on pier by ILA deep-sea labor.

ment by the maritime carrier of a fine of $250 per container (subsequently increased to $1000 per container in 1973) for each container shipped in violation of the Rules.

Notwithstanding the 1968 Rules on Containers, until 1973 containers loaded by CEI went through the Port of New York without interference.[15] In that year, ILA and the Council of North American Shipping Associations ("CONASA"), which includes NYSA, formally adopted restrictive new rules at a meeting in Dublin. These "Dublin Rules" provided that NYSA members could no longer supply containers to off pier consolidators. The containers are of course the life blood of the freight consolidation business—without containers, the business cannot function. A list of 14 proscribed consolidation facilities, including those operated by CEI, was circulated among NYSA members. Shortly thereafter, various officials of the three U.S.-Puerto Rican maritime carriers (Sea-Land Service, Inc., Seatrain Lines, Inc., and Transamerican Trailer Transport, Inc.) advised CEI's officers that they would no longer supply CEI with containers unless CEI moved its operations to the waterfront and substituted ILA deep-sea labor for its teamster platform and driver personnel. This alternative was simply not economically or practically feasible.[16] Faced with extinction, CEI filed the unfair labor practice charges which are the subject of this case.

[15] *See* the NLRB's decision at A72 and the court of appeals decision at A88.

[16] For example, CEI has a collective bargaining agreement with the teamsters that could not be set aside by moving to the docks.

Based on the above facts, the NLRB rendered an opinion that the Rules on Containers were tactically calculated to benefit the ILA generally and sought to acquire work that had not been traditionally the work of the union. Finding these Rules violative of Sections 8(b)(4) and 8(e) of the Act, the NLRB issued an order that the petitioners cease and desist from maintaining or implementing the Rules. The court of appeals found the Board's decision to be supported substantial evidence and enforced the order of the NLRB.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court Below Does Not Conflict with Prior Decisions of this Court

In seeking a Writ of Certiorari, Petitioners have attempted to create a conflict between the decision below and this Court's ruling in *National Woodwork Manufacturers' Association* v. *NLRB,* 386 U.S. 612 (1967). No such conflict exists. To the contrary, the decision in this case conforms to and properly applies the guidelines set forth in *National Woodwork* for determining whether a boycott provision is permissable work preservation or unlawful secondary work acquisition.

In *National Woodwork,* the Court defined the reach of Sections 8(b)(4) and 8(e) of the Act as permitting work preservation actions directed toward the primary employer, while prohibiting activities that sought the acquisition of neutral employees' work. Thus, the critical issue in the case of a collective bargaining agreement which seeks to limit certain work to unit members is the objective of the union action. In evaluating

such provisions, the Court required consideration of "all the surrounding circumstances" to determine whether the union's objective was work preservation or whether the agreement and boycott were tactically calculated to satisfy general union objectives. 386 U.S. at 644-45. The Court pointed to such circumstances as the history of labor relations in an industry, its "economic personality," and the threat of displacement by the banned products or services. *Id.* at 644 n. 38. It recognized that the difference between primary work preservation and illegal secondary work acquisition involves precise factual determinations:

> There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this [prohibited] category. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. This will not always be a simple test to apply. (*Id.* at 645 (footnotes omitted).)

In *National Woodwork* the NLRB had determined, in light of the facts before it, that the object and effect of the agreement in question was work preservation and not secondary work acquisition. This Court held that the NLRB's decisions was supported by substantial evidence. In the present case, the NLRB found that the Rules on Containers had an illegal secondary purpose and effect, in that they represented an attempt by ILA to reach beyond its traditional work jurisdiction and to acquire work which longshoremen had never performed. The Second Circuit affirmed the NLRB's determination. The record below contains substantial, indeed overwhelming, evidence of the secondary nature of the Rules on Containers.

In light of this evidence, the decisions of the NLRB and the court below do not contravene *National Woodwork*. Those decisions recognize the existence of a non-ILA tradition of freight consolidation for shipment in maritime containers which substantially predates any ILA tradition in the performance of any arguably related work. With NYSA's participation, ILA sought to acquire that off pier work, which its members had never performed, by promulgating and enforcing the Rules on Containers. Such an effort is secondary and illegal. Employees cannot "preserve" and cannot "reacquire" work which they have never performed.

ILA and NYSA contend that the NLRB and the court below impermissably focussed on the work done by the off pier consolidators, rather than that performed by longshoremen. This argument lacks a basis in logic or legal authority. The Supreme Court in *National Woodwork* clearly contemplated an inquiry into all the "surrounding circumstances" of a union's boycott activity. These circumstances necessarily include the nature of the work which the subject bargaining unit is attempting to reserve to itself and the economic effect of the boycott on other employers and employees in the industry. The existence of parallel competing labor traditions with superior claims to the work at issue, and which stand to be destroyed by the boycott activity, has an obvious impact on the determination of whether the bargaining unit is pursuing illegal secondary objectives.

To examine only the work done by the longshoremen, as petitioners suggest, and to conclude that they may acquire any work similar to that which they perform on the docks, is to ignore the long-standing work tradition of teamsters and other off pier workers. Moreover, petitioners' approach would effectively abolish the distinction between primary and secondary activity. The sole criteria would be the determination and economic leverage of any union which chooses to expand its work jurisdiction. The Board's decision, by contrast, preserves the Act's purpose in outlawing secondary boycotts and hot cargo agreements and correctly applies the teaching of *National Woodwork*.

II. The Decision Below Creates No Conflict with the Decisions of Other Circuits

Petitioner ILA claims that the decision in this case conflicts with other cases decided by the courts of appeals. Specfically, it cites doctrines of "fairly claimable work," "customary work function," and "work recapture," each of which it identifies with a different circuit. (Petition of ILA at 13-14.) This attempt to create conflict where none exists must fail. Each of the cases cited was decided on its own facts and surrounding circumstances, inapplicable to those in the present case.

For example, the "work recapture" cases[17] stand for the proposition that collective bargaining agreements can legitimately provide for the reacquisition of traditional unit work which has been partially lost. No such issue is involved in this case. The stuffing and stripping of containers at off dock facilities was not the traditional work of ILA. Rather, ILA attempted to extend its jurisdiction to an area where it had no

---

[17] *E.g., Meat & Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964), *American Boiler Manufacturers Ass'n* v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970).

traditional work. Under those circumstances, the issue of work recapture does not arise.[18]

ILA seeks to transmute the "fairly claimable work" doctrine, essentially a restatement of the *National Woodwork* test, into a "some begets all" argument whereby the "sparse" record evidence[19] that ILA members sometimes containerized loose cargo brought to the piers would entitle them to claim all containerization work done off the piers. Such an argument is clearly at odds with the work preservation doctrine of *National Woodwork*. As stated by Justice Harlan in his accompanying memorandum in *National Woodwork:*

> This, then, is not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs.[20]

As the D.C. Circuit has recognized, such doctrines as "work recapture" and "fairly claimable work" ap-

[18] Cases relying on the doctrine of "fairly claimable work" or "customary work function" are equally inapplicable here. In *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970), retail clerks successfully claimed work which was not only identical, in kind and in location, to that which they were already performing, but which they had in fact previously performed. 421 F.2d at 909. Similarly, *compare Sheet Metal Workers Int'l Ass'n Local 223* v. *NLRB*, 498 F.2d 687, 695-96 (D.C. Cir. 1974) *with Sheet Metal Workers Int'l Ass'n, Local 98* v. *NLRB*, 433 F.2d 1189, 1194-95 (D.C. Cir. 1970).

[19] ALJ's decision at A36 n.8.

[20] 386 U.S. at 648. *See also* NLRB v. National Maritime Union, 486 F.2d 907, 913-14 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); Local 282, IBT (D. Fortunato, Inc.), 197 NLRB 673, 80 LRRM 1632 (1972).

ply only to jobs in which the union has "a valid work preservation interest" as defined by *National Woodwork. Sheet Metal Workers, supra,* 498 F.2d at 693. The NLRB's decision and order here are not in conflict with circuit court decisions applying those doctrines because ILA had no such valid interest in the work it sought to acquire from off pier workers.[21]

More importantly, the Second Circuit's decision in this case is entirely consistent with a decision whch neither petitioner has seen fit to cite. That case, *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co.)*, 208 NLRB 994, 85 LRRM 1300 (1974), *enforced sub nom. Pacific Maritime Ass'n* v. *NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied,* 96 S. Ct. 1409 (1976) (*"Cal Cartage"*), is essentially identical in facts and outcome to the present case.

Cal Cartage grew out of an effort by the International Longshoremen's and Warehousemen's Union ("ILWU"), the West Coast longshoremen, to acquire the stuffing and stripping work of employees of off dock consolidators through the imposition of rules on containers similar to those at issue in this case. Charges were filed against the union and PMA, the West Coast maritime employer's association, by off pier consolidators. An extensive record was compiled showing that the off dock workers had a long tradition of container

[21] Local 742, United Bro. of Carpenters v. NLRB, 444 F.2d 895 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971), also cited by ILA, does not discuss the issue of "fairly claimable work," but instead rejects the "right to control" doctrine. The "right to control" doctrine is not an issue in the present case, despite the efforts of petitioners to link this case with *Enterprise Ass'n of Steam, Etc. Local No. 638* v. *NLRB*, 521 F.2d 885 (D.C. Cir. 1975) *cert. granted*, 96 S. Ct. 1101 (1976), recently argued before this Court.

work which paralleled that of the ILWU members. The NLRB concluded that the ILWU did not have a claim to the off dock work. The D.C. Circuit affirmed after argument but without an opinion, and this Court denied certiorari. In short, the instant case is entirely consistent with the decision by the D.C. Circuit on the West Coast version of the Rules on Containers.[22]

III. The Decision Below Does Not Conflict with Prior Decisions of the Second Circuit

Petitioners also assert a novel theory that this Court should grant certiorari because the decision of the court of appeals conflicted with two other Second Circuit decisions, *Intercontinental Container Transport Corp.* v. *New York Shipping Association,* 426 F.2d 884 (2d Cir. 1970), *rev'g* 312 F. Supp. 562 (S.D.N.Y.) (*"ICTC"*); and *Pittston Stevedoring Corp.* v. *Dellaventura, Etc.,* Docket Nos. 76-4042, 76-4009, 76-4043 and 75-4249 (2d Cir. July 1, 1976), *petition for cert. docketed,* No. 76-454. Not surprisingly, these supposed conflicts did not impress the court of appeals.[23]

---

[22] The only substantial factual distinctions between *Cal Cartage* and the present case tend to strengthen the decision of the NLRB and the Second Circuit in this case. In *Cal Cartage* the off pier consolidators were direct subcontractors of the longshore employers' association, PMA. The work at issue had long been performed directly for the account of and pursuant to contract with the maritime shipping companies represented in PMA. In this case, CEI and Twin have operated as independent NVOCCs for their own account not on behalf of or by contract with the maritime shipping companies. Thus, ILA's actions were not aimed at preventing contracting out of work by NYSA, but were purely acquisitive and secondary. Even more clearly than was the case in *Cal Cartage*, the off pier work at issue is not "fairly claimable" by the longshoremen.

[23] Petitioners failed to gain the request of even one circuit judge that a vote on rehearing en banc be taken. A98.

ICTC was an antitrust case brought under the Sherman Act. Plaintiff ICTC alleged that NYSA and ILA had combined and conspired to misuse the container rules by refusing to admit it to NYSA membership and refusing to negotiate with it an ILA collective bargaining agreement, thereby preventing it from competing with stevedore members of NYSA.[24] After the district court granted a preliminary injunction to ICTC, the Second Circuit reversed. Since the NLRB had not decided on the legality of the Rules on Containers, they were regarded by the Court as valid work preservation measures.[25]

As the court of appeals stated in *ICTC,* the issues in that case were based on different allegations and sought a different remedy from those raised in the present action under the National Labor Relations Act.[26] In the present case, the validity of the later and more patently secondary 1973 Dublin Rules on Containers has been challenged directly, and here the NLRB has

---

[24] 312 F. Supp. at 567-68. ICTC had previously filed charges with the NLRB alleging that the Rules on Containers violated Sections 8(b)(4) and 8(e) of the Act. The Regional Director and the General Counsel of the NLRB had rejected these charges. A separate suit by ICTC against NYSA and one of its members had also been dismissed, on the ground that NLRB's jurisdiction preempted that of the court. *Id.*

[25] The district court had so assumed, 312 F.Supp. at 573-74, and ICTC explicitly agreed in its brief to the court of appeals:

> *ICTC has not attacked the validity of these Rules, for they appear to be job-saving* if properly utilized, but it is the illegal anticompetitive implementation by the appellants which ICTC seeks to enjoin. Brief of Appellee Intercontinental Container Transport Corp., at 17. (Emphasis added.)

[26] 426 F.2d at 887. The court explicitly rejected ILA's and NYSA's claim that the Sherman Act cause of action was preempted by the NLRB's jurisdiction. *Id.*

unanimously found the 1973 rules to be invalid based on a thorough review of the evidence and the history of the industry.

No such thorough review occurred in *Pittston,* the second case cited by petitioners. That case involved narrow issues raised under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("Compensation Act"). As the court of appeals there stated:

> We begin our analysis by remarking on the unsatisfactory state of the records before us. . . . When cases of this nature began coming to the BRB [Benefits Review Board] shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction . . . which task could be performed satisfactorily only in the light of an extensive factual background. . . . *The following are illustrative of facts we would like to know but on which these records shed little or no light,* even as regards the port of New York. . . . *Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters?* . . . Instead of developing such a record . . . the BRB has handled each case on an individual basis, and without establishing any record support for the interpretive rules announced therein.[27]

In the face of the court of appeals' inadequate record in *Pittston,* it is inappropriate even to cite that case as precedentially valuable with reference to factual questions arising from the operation of the Com-

[27] A123-A124 (emphasis added; footnote omitted).

pensation Act. When the extensive record developed during the course of the present case is contrasted with that in *Pittston,* the notion that *Pittston* may be advanced as the basis for contradicting the factual findings of the NLRB in this case is patently unacceptable.

In short, the Second Circuit quite properly was unpersuaded by the relevancy of *ICTC* or *Pittston.* Petitioners' argument of conflict based on decisions in the same circuit as the instant case is without logical or legal basis.

CONCLUSION

For the reasons set forth above, the Petitions for Writs of Certiorari in Nos. 76-569 and 76-570 should be denied.

Respectfully submitted,

MARTIN D. SCHNEIDERMAN
JAMES D. HUTCHINSON
SAMUEL T. PERKINS
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Intervenor-Respondent Consolidated Express, Inc.

see

76

570